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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered on July 18, 1960, modifying an order issued by the Board against respondents.

OPINIONS BELOW

The opinion of the court of appeals enforcing the Board's order with modifications (*infra.* pp. 7–11) is reported at 280 F. 2d 441. The opinion denying the Board's petition for rehearing is reported at 283 F. 2d 26.[1] The findings of fact, conclusions of law, and

[1] The opinion on rehearing, a joint opinion disposing of seven cases, is printed in the appendix to the Board's petition for certiorari in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. —, this Term, which is being filed simultaneously with this petition.

order of the Board (R. 1–13, 19–21)[2] are reported at 124 NLRB 538.

JURISDICTION

The court of appeals entered its decree on July 18, 1960 (*infra*, p. 11–12) and denied the Board's petition for rehearing on October 18, 1960 (*infra*, p. 13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether the court of appeals has power under Section 10(e) of the National Labor Relations Act to modify an order entered by the National Labor Relations Board, where the Board adopted the Trial Examiner's recommended order in the absence of exceptions thereto.

STATUTE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) are set forth at pp. 14–15 of the Board's petition for certiorari in the companion case, *National Labor Relations Board* v. *Brandman Iron Co.*, No. 646, this Term.

STATEMENT

Following an unfair labor practice hearing, the Trial Examiner issued an intermediate report finding

[2] "R." refers to the printed appendix to petitioner's brief in the court of appeals.

that respondents had violated Section 8(b)(4)(A) of the Act by inducing and encouraging the employees of Cuddigan, a subcontractor, to engage in a concerted refusal to work on a construction project, in order to compel Cuddigan to cease doing business with Turgeon, the primary contractor (R. 1–12). The Examiner's recommended order required that respondents:

> 1. Cease and desist from engaging in, or inducing or encouraging the employes of [Cuddigan] *or any other employer* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require [Cuddigan], *or any other employer or person* to cease doing business with [Turgeon]. [R. 11; emphasis added.]

Affirmatively, the recommended order required, *inter alia,* that respondents post notices of compliance with the cease and desist provision, including the italicized language (R. 11–13).

Respondents filed exceptions to "certain rulings and findings" of the Trial Examiner, but did not except to the terms of the cease and desist provision (R. 14–15). The Board accordingly entered an order (R. 19–21) adopting the recommended order of the Trial Examiner, including the references to "any other employer" quoted above.

The Board petitioned the court below for enforcement of its order. On July 18, 1960, the court issued an opinion and decree granting enforcement, but mod-

ifying the order by striking the references to any other employer (*infra*, pp. 11–12).[3] The Board filed a petition for rehearing, which was denied by the court in an opinion [4] and order (*infra*, p. 13) issued on October 18, 1960.

REASONS FOR GRANTING THE WRIT

1. This case presents the same issue as that involved in *National Labor Relations Board* v. *Brandman Iron Company*, 281 F. 2d 797 (C.A. 6), petition for certiorari pending, No. 646, this Term—*i.e.*, whether the court of appeals has power under the Act to modify provisions of a Board order which were not contested

[3] In adopting the Trial Examiner's proposed order, forbidding secondary pressure against Turgeon through Cuddigan "or any other employer" (*i.e.*, through any other *secondary* employer), the Board had also added a clause forbidding secondary pressure against "any other company or person" (*i.e.*, against any other *primary* employer) (R. 20), and that clause was also deleted by the court of appeals. While we believe that deletion was equally beyond the power of the court—since no exception had been taken to that clause before the Board—the Board made no objection to that modification in its petition for rehearing before the court of appeals, and we do not challenge it here.

[4] The court's opinion disposed of a total of seven cases, in three of which the Board is simultaneously filing petitions for certiorari: (1) *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*; (2) *National Labor Relations Board* v. *Las Vegas Sand and Gravel Corp.*; and (3) the instant case. The opinion is printed in the appendix to the petition in *Ochoa Fertilizer*.

before the Board.[5] As shown in the petition in *Brandman*, to which we respectfully refer the Court, the view of the court below is contrary to decisions of this Court and in conflict with those of other circuits. Moreover, the question presented is of importance in the administration of the Act.

2. Even if the court below had power to modify the uncontested provisions of the Board's order, its action in limiting the order to the particular secondary employer whose employees were induced by the union is contrary to settled authority. As this Court held in *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 341 U.S. 694, 705–706, "[t]o confine the order solely to secondary pressure through * * * [the secondary employer currently involved] would leave * * * [the primary employer] and other employers who do business with him exposed to the same type of pressure through comparable channels." See also, *National Labor Relations Board* v. *Dallas General Drivers, Warehousemen and Helpers Local Union No. 745*, 46 LRRM 3119 (C.A. 5), restoring a provision similar to that deleted by the court below, on the authority of *Electrical Workers*.

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[5] As noted in the *Brandman* petition (p. 8, n. 7), no relevant distinction may be drawn from the fact that *Brandman* involves a consent settlement prior to hearing, and the instant case, the entry of an uncontested order following a hearing. Cf. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388–389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, or, in the alternative, held in abeyance pending the decision in *Brandman*.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

JANUARY 1961.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5590.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND ITS BUSINESS AGENT, WILLIAM O'BRIEN, RESPONDENTS.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

[124 N.L.R.B. No. 75].

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

OPINION OF THE COURT.

July 18, 1960.

HARTIGAN, *Circuit Judge.* This is a petition for enforcement of an order of the National Labor Relations Board entered August 20, 1959 pursuant to the Board's decision, 124 N.L.R.B. No. 75, which found that respondent union, Local 476, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and its business agent William O'Brien,

violated Section 8(b)(4)(A), 49 Stat. 452 (1947), 29 U.S.C. § 158(b)(4)(A) (1958).[1]

The Board found that the respondents violated this section of the Act by inducing and encouraging employees of Joseph P. Cuddigan, Inc., a subcontractor installing heating equipment, to engage in a concerted refusal to work with an object of compelling Cuddigan to cease doing business with E. Turgeon Construction Co., Inc., the general contractor. Respondents contend that the petition should be denied because (1) there is not substantial evidence in the record considered as a whole to support the Board's findings, and (2) that even if the record contains such substantial evidence the record does not warrant the broad order.

We are satisfied that the record viewed as a whole does contain substantial evidence to support the Board's findings. In the record there is testimony by George Alfred Turgeon, president of the E. Turgeon Construction Co., that William O'Brien, business agent of the union, Local 476, phoned him and asked him to put a steamfitter on the job of maintaining and operating the temporary heating system in the construction project. Turgeon testified he replied "no" and that O'Brien said he would have to take the steamfitters off the job. The testimony of Robert Skinner, Cuddigan's foreman on the project, and Douglas Brunt, a Cuddigan employee, was that O'Brien came to the project on the following Monday and told them that if they did not hear from him that they should lock the tool box and leave the job until he contacted them. Turgeon testified to a conversation with Skinner in which Skinner said he was following instructions and in response to a question said

[1] This section has been amended by Pub. L. 86-257, § 704a, 73 Stat. 542 (1959) but governs this case.

he supposed that the taking of Cuddigan's men off the job was on account of the temporary heating problem. The minutes of a meeting of the executive board of the union stated that the decision to walk off the Turgeon job was made to protect the jurisdiction of the steamfitters.

O'Brien testified that his purpose in visiting the project and in contacting Turgeon was to find out who was responsible for maintaining the temporary heat and that he was unable to discover who made the ruling depriving the union of jobs rightfully belonging to it. However, O'Brien admitted that his only interest in the temporary heat situation would be to have a steamfitter hired, and such was understood by Turgeon when O'Brien called him.

On the record viewed as a whole we conclude that there is substantial evidence to support the Board's finding of a violation of Section 8(b)(4)(A).

In regard to respondents' contention that the petition should be dismissed because the Board's order is too broad, we are of the opinion that there is not sufficient evidence in the record to support the issuance of the broad order. The order requires that respondents cease and desist from inducing or encouraging "employees of Joseph P. Cuddigan, Inc. *or of any other employer*" to engage in a strike or concerted refusal to work where an object thereof is to force "Joseph P. Cuddigan, Inc., *or any other employer or person* to cease doing business with E. Turgeon Construction Co. *or any other company or person*" and to post appropriate notices. (Italics ours). As we indicated in *National Labor Relations Board* v. *Bangor Building Trades Council, AFL–CIO, et al.*, Apr. 18, 1960 (1 Cir.), and in *National Labor Relations Board* v. *Local 111, United Brotherhood of Carpenters and Joiners etc. et al.*, decided by this court on May 24,

1960, enforcement of a broad order will be granted only where the record supports a conclusion of the necessity or appropriateness of such a broad order. *Communications Workers of America, AFL–CIO et al.* v. *N.L.R.B.*, 362 U.S. 479, 480, 481 (1960). See also *N.L.R.B.* v. *United Brotherhood of Carpenters*, 276 F. 2d 694 (7 Cir. 1960); *N.L.R.B.* v. *Local 926, Int. Union of Operating Eng. etc.*, 267 F. 2d 418 (5 Cir. 1959); *International Brotherhood of Team, etc.* v. *N.L.R.B.*, 262 F. 2d 456 (D.C. Cir. 1958).

In the instant case, neither the trial examiner nor the Board made any finding relating to the likelihood of similar violations by respondents. The only facts pointed out by counsel for the Board on this petition are that the respondent union had a collective bargaining agreement with an association of heating and piping contractors and that the union's decision was made to protect its jurisdiction. These facts alone do not sufficiently indicate that respondents will commit similar violations as to others in the future. Nor can reliance be placed on a past dispute as to employment of a steamfitter to maintain a temporary heating system which was mentioned in the record, since the settlement agreement specifically disclaims any admission by the union of a Section 8(b)(4)(A) violation. See *N.L.R.B.*v. *Local 926, Int. Union of Operating Eng., etc., supra.* This certainly cannot support a conclusion of a "proclivity for unlawful conduct." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

We do not agree with respondents' contention that the undue breadth of the order warrants dismissal of the petition. Section 10(e) of the Act, 29 U.S.C. § 160(e) (1958) empowers this court to modify an order on a petition for enforcement. We shall modify the broad order by striking the phrases "or

of any other employer", "or any other employer or person" and "or any other company or person" from the order and thus enter a decree enforcing the order as so modified.

A decree will be entered enforcing the order of the Board except to the extent inconsistent with this opinion.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5590.

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING ETC., ET AL., RESPONDENTS

DECREE.

July 18, 1960.

This cause came on to be heard upon the petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now, to wit, July 18, 1960, here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of August 20, 1959, as modified herein, and with the exception of paragraph 2(c), is hereby affirmed and enforced.

Paragraph 1 of said order and the notice appended to said order are each modified by striking therefrom the words "or of any other employer", "or any other employer or person" and "or any other company or person".

It is further ordered that the respondents herein notify the Regional Director for the First Region in

writing within fifteen (15) days of this Decree of the steps they have taken to comply with said order as herein modified, and affirmed and enforced.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

A true copy:
Attest:

ROGER A. STINCHFIELD,
Clerk.

No. 5590

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND ITS BUSINESS AGENT, WILLIAM O'BRIEN.

ON PETITION FOR REHEARING

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

OPINION OF THE COURT

October 18, 1960.

[Omitted. Opinion printed in appendix to petition for certiorari in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. —, this Term.]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5590.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING ETC., ET AL., RESPONDENTS.

ORDER OF COURT.

October 18, 1960.

It is ordered that the Petition for Rehearing filed by petitioner on August 2, 1960, be, and the same hereby is, denied.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE 1961

FILED
FEB 17 1961
JAMES R. BROWNING, Clerk

No. [redacted] 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL., *Respondents*

BRIEF FOR LOCAL 476 OF THE UNITED ASSOCIATION IN OPPOSITION

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Section 8(b)(4)(A) 2
Section 10(e) 2, 4, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 656

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL., *Respondents*

BRIEF FOR LOCAL 476 OF THE UNITED ASSOCIATION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals enforcing the Board's Order with modifications (Pet. Br. pp. 7-11) is reported at 280 F. 2d 441. The opinion denying the Board's petition for rehearing is reported at 283 F. 2d 26.[1] The findings of fact, conclusions of law and order

[1] In ruling on the petition for rehearing, the Court issued a joint opinion disposing of seven cases. The Board has petitioned for certiorari in three of those cases: *NLRB* v. *Ochoa Fertilizer Corp.*, No. 654; *NLRB* v. *Las Vegas Sand and Gravel Corp.*, No. 655, and the instant case. The opinion of the Court is printed in the Appendix to the Board's petition in *Ochoa Fertilizer Corp.*, *supra*.

of the Board (R. 1-13, 19-21)[2] are reported at 124 NLRB 538.

JURISDICTION

The Court of Appeals entered its decree on July 18, 1960 (Pet. pp. 11-12), and denied the Board's petition for rehearing on October 18, 1960 (Pet. p. 13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTION PRESENTED

Upon the basis of the record made below, no question is presented for consideration by the Court in this case.

STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 146, as amended 29 U.S.C. § 160), appear at pages 14 and 15 of the Board's petition for certiorari in *National Labor Relations Board* v. *Brandman Iron Company*, No. 646, this term.

STATEMENT

The Respondents, after hearing, were found to have violated Section 8(b)(4)(A) of the National Labor Relations Act. The Trial Examiner found that the Respondents had induced and encouraged the employees of Cuddigan, a subcontractor, to engage in a strike or a concerted refusal to work on a construction project in order to compel Cuddigan to cease doing business with Turgeon, the general contractor. As a result of

[2] "R" refers to the printed appendix to Petitioner's Brief in the Court of Appeals, certified to this Court.

the above finding, the Trial Examiner recommended the following order:

> "1. Cease and desist from engaging in, or inducing or encouraging the employees of Joseph P. Cuddigan, Inc. *or any other employer* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Joseph P. Cuddigan, Inc.; *or any other employer or person* to cease doing business with E. Turgeon Construction Co. Inc." (R. 11; emphasis supplied).

The Trial Examiner also recommended the usual posting but the notice did not conform to the recommended order. The recommendation in the notice was broader than the recommended order in that after "E. Turgeon Construction Co. Inc.", the phrase "*or any company or person*" was added. (R. 13).

Respondents filed exceptions to several of the rulings and findings of the Trial Examiner, including an exception to the broad recommendation embodied in the notice and its inconsistency with the recommended order (R. 14, 15). Thereafter, the Board entered an order "adopting the findings and recommendations of the Trial Examiner" but in fact the Board adopted the broad recommendation of the Trial Examiner included in the notice as its order rather than the Trial Examiner's Recommended Order.[3]

[3] The Board Order if enforced, would have subjected the Union to contempt proceedings—not a Board hearing—for any action the Board might consider secondary against *any employer, company or person* presumably anywhere in the nation ad infinitum.

The Board's petition for enforcement was granted by the First Circuit but the Board's order was modified by striking all references to "or of any other employer," "or any other employer or person" and "or any other company or person" (Pet. pp. 11-12). The Board's petition for rehearing was denied by the court in a joint opinion.[4]

REASONS FOR DENYING THE WRIT

1. There is no question presented by the proceedings below which is properly before this Court.

The Board states that the question presented here is whether a court of appeals under Section 10(e) of the Act can modify a Board order in the absence of exceptions to the Trial Examiner's recommended order. This question may be involved in the other cases in which the Board is simultaneously seeking certiorari[5] but it is not presented in this case because the Board did not raise the point in any of the proceedings in the court below. This Court has repeatedly held that where the only question raised by the petition for certiorari was not raised in the court below, the petition will be denied. *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, and *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378. The Court, in *McCullough*, in dismissing the petition as being improvidently granted, stated:

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[4] See note 1, *supra*. On rehearing the Board abandoned the "or any other company or person" clause of its order. The *Ochoa Fertilizer* and *Las Vegas Sand and Gravel* cases, unlike the instant case, involve modifications by the court of broad orders entered by the Board with the consent of the respondents as part of stipulated settlements.

[5] See Note 1, *supra*, and *Brandman Iron Company*, No. 646

> "Thus, the only question for which we granted certiorari is one not properly raised, litigated or passed upon below." 323 U.S. at 328.

See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55; *DeSylva* v. *Ballantine*, 351 U.S. 570; *Michel* v. *Louisiana*, 350 U.S. 91; *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241.

There is no valid reason for the Board's failure to raise, in the court below, the issue it presently asks this Court to determine. From the very beginning of the enforcement proceedings in the circuit court, the Board was aware that the Respondent resisted enforcement on the grounds, *inter alia*, that the order of the Board was too broad in scope. In its brief in support of its petition for enforcement,[6] the Board defended the scope of its order, *not* on the ground that the circuit court had no "power" to modify the order because no exceptions were taken to the Trial Examiner's recommended order, but on the ground that there was substantial evidence in the record to warrant the issuance of a broad order. Respondent, in its brief to the court below, clearly resisted enforcement of the order on the ground that the broad order was not appropriate on the basis of the evidence submitted at hearing (Resp. Br. Ct. of App., pp. 9, 13-16).

After the court modified the order, finding it inappropriate, *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, the Board filed for rehearing and again defended its Order on the ground that the record supported the necessity for a broad

[6] Bd. Br. Ct. of Ap. pp. 11, 13-14. The briefs of the Board and Respondents in the Court of Appeals and the Board's petition for rehearing have been certified to this Court.

order. Neither in the petition for rehearing nor in its initial brief did the Board make any argument which could even be remotely considered to be an objection to the Court modifying the Board's order in the absence of exceptions to the Trial Examiner's report. In view of the Petitioner's complete failure to raise this question below, irregardless of the merits of its position, this Court will not review the question. *Michel* v. *Louisiana*, *supra* at 101.

The opinion below *in this case* did not discuss the point now raised. The Court, in its joint opinion, did discuss the question but not in regard to the instant case. The joint opinion was issued only because

> "The questions presented by the several motions are not identical but they all involve the appropriate breadth of a particular order", 283 F. 2d at 27.

The *Ochoa* and *Las Vegas* cases, unlike the instant case, involved modification of consent Board orders entered pursuant to settlement stipulations. The court discussed the cases separately and considered its authority under Section 10(c) only with regard to the consent cases.[7]

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[7] The Board asserts as one of the reasons for granting the writ that the decision of the court below, in limiting the breadth of the Board's order, is contrary to settled authority, citing *I.B.E.W.* v. *N.L.R.B.*, 341 U.S. 694. It does not appear, however, that the Board is seeking certiorari on the ground that the court below erred in limiting the scope of the Board's order but rather that certiorari is sought only on the question of whether the court in these circumstances had the *power* to modify the order. However, even assuming that the Board is also asking for a review on the merits of the Board order based on *I.B.E.W.* v. *N.L.R.B.*, *supra*, certiorari should still be denied. The cases are not in conflict and the *I.B.E.W.* case is not controlling here. There a broad order

2. The most important ingredient of Petitioner's question, on the lower court's power under Section 10(e) of the Act, is the failure to object to the recommended order before the Board. Even assuming a proper objection was not made to the recommended order, Petitioner's question is not properly before this Court. The Board did not adopt that order but changed it, increasing its scope. Since the Board issued a *different* order than the Trial Examiner, naturally no objection could be made to it before the Board and the court could modify the order since timely objections were raised at the first opportunity—on the petition for enforcement. The limitation on court review in Section 10(e) would not apply in this situation. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 331 U.S. 416, 427.

3. The Board has abused its administrative processes in this case and such practices should not be sanctioned

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was appropriate. The record contained evidence of a long standing dispute between the union and the primary employer. 391 U.S. at 696. See *I.B.E.W. and Langer*, 82 NLRB 1028, 1039 (I.B.). Here, the court below found that "neither the trial examiner nor the Board made any finding relating to the likelihood of similar violations by respondents." 280 F. 2d at 443. The court also properly refused to consider a prior settlement stipulation as evidence of a past dispute. *N.L.R.B.* v. *Local 926, Operating Eng.*, 267 F. 2d 418 (5th Cir., 1959). In any event *I.B.E.W.* v. *N.L.R.B.*, *supra*, certainly did not hold that a broad order was required in every secondary boycott case. See *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426. Further, this Court will not review a decision of a court of appeals involving a fair assessment of the record on the issue of substantiality of evidence supporting a Board order. *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502, and, since the scope of this order affects only private parties rather than principles important to the public, certiorari should be denied on this point. *Layne and Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393.

by this Court. Prior to the issuance of a complaint here, Respondents offered to enter into an informal settlement with the Board. This was rejected (R. 18). On May 11, 1959, after issuance of the Intermediate Report, the Board asked the Respondents to comply with the Recommended Order and avoid further formal action. This offer was accepted by Respondents (R. 17). One day before exceptions to the Intermediate Report were due, the Board repudiated its offer (after acceptance) on grounds which the court below considered to be without merit.[8]

After enforcement with modification was granted, the Board notified Respondents what action was necessary for compliance (Appendix A, *infra*, pp. 10-11). The Respondents immediately complied. (Appendix B, *infra*, p. 11) Shortly thereafter, the Board petitioned for rehearing. Then, ten days after the court denied the petition for rehearing, the Board notified Respondents that the case was *closed* (except for future violations) since Respondents had fully complied with the court's order. (Appendix C, *infra*, p. 12). Nearly three months later, the Respondents received the Board's petition for certiorari.

While the Act does not require the Board to play hide and seek with those guilty of unfair practices,[9] it would seem that justice demands that those charged need not be compelled to play such a game with the Board. This appears to be a case of the left hand of the Board not knowing what the right hand is doing and vice versa. This Court should not sanction

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[8] See note 7, *supra*; R. 18 and 45.

[9] *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567.

such loose and irresponsible practices on the part of a governmental agency.

Respondents realize that a case does not become moot because a Board order is complied with during enforcement proceedings, *Mexia Textile Mills, supra*, but here Respondents complied with a Court order and were notified that the case was closed. In view of the conduct of the Board here, the Court should deny the writ out of a "consideration of fairness to the [lower] court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159.[10]

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

MARTIN F. O'DONOGHUE
831 Tower Building
Washington 5, D. C.

DONALD J. CAPUANO

Counsel for Respondents

SHERWOOD & CLIFFORD
1003 Turks Head Building
Providence, Rhode Island

Of Counsel

[10] Furthermore, assuming the Board is correct in stating this case involves the same issue presented in *Brandman Iron Co.*, No. 646; *Ochoa Fertilizer Corp.*, No. 654, and *Las Vegas Sand and Gravel Co.*, No. 655, there does not appear to be any reason at all why certiorari should be granted in this case.

APPENDIX A

[LETTERHEAD—NATIONAL LABOR RELATIONS BOARD]

July 25, 1960

Local 476, United Association of Journeymen
& Apprentices of the Plumbing and Pipefitting
Industry of the United States and Canada,
AFL-CIO and Its Business Agent, William O'Brien
85 Broadway
Providence, Rhode Island

RE: Local 476, United Association of Plumbing,
etc. & Its Agent William O'Brien (E. Turgeon
Construction Co., Inc.)—Case No. 1-CC-224

Gentlemen:

You have recently received the Decree of the Circuit Court of Appeals in the above case. Pursuant thereto, you are required to notify us within fifteen days what steps you have taken or will take to comply. I trust that within this period I will be able to report to the Board that you have taken the required action so that further formal proceedings can be avoided.

To assist you in effecting compliance, I have assigned Examiner Martin P. Burns, who will contact you in the near future; in the interim, if you have any questions, please write or telephone the assigned Board Agent.

Kindly advise us how many copies of the Notice you will need in order to comply with the Decree and we will send the requisite number to you immediately.

If and when you have fully complied with the affirmative terms of the Decree and there are no reported violations of its negative provisions, we shall notify you that the case has been "closed" on compliance. Until you receive such notice, you will know the case

still remains open on our records for all purposes as awaiting compliance.,

Yours very truly,

BERNARD L. ALPERT
Regional Director

cc to Raymond E. Jordan, Esquire
Sherwood & Clifford
1003 Turks Head Building
Providence, Rhode Island

APPENDIX B

[LETTERHEAD—SHERWOOD & CLIFFORD, ATTORNEYS AT LAW]

September 30, 1960

National Labor Relations Board
First Region
24 School Street
Boston 8, Massachusetts

Attention: Martin B. Burns, Field Examiner

Re: National Labor Relations Board, Petitioner vs. United Association of Journeymen & Apprentices of the Plumbing, etc., et al, Respondents C.C.A. No. 5590 Your case No. 1-CC-224

Gentlemen:

In the above entitled matter we do hereby inform you that we have fully complied with the posting requirements as set forth in your letter of July 28, 1960, said posting having commenced on July 29, 1960.

Very truly yours,

Local 476, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

WILLIAM M. O'BRIEN, Business Agent

By their attorneys,

WAC emb

APPENDIX C

[LETTERHEAD—NATIONAL LABOR RELATIONS BOARD]

October 28, 1960

Local 476, United Association of Journeymen
and Apprentices of the Plumbing and Pipefitting
Industry of the United States and Canada, AFL-CIO
85 Broadway
Providence, Rhode Island

Attention of William O'Brien, Business Agent

Re: Local 476, United Association of Journeymen, etc. (Rhode Island Chapter, Associated General Contractors of America, Inc.)—
Case No. 1-CC-224
(E. Turgeon Construction Co., Inc.)

Gentlemen:

The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed.

Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur.

Yours very truly,

BERNARD L. ALPERT
Regional Director

cc to Sherwood & Clifford
Executive Secretary,
National Labor Relations Board,
Washington 25, D. C.

Rhode Island Chapter, Associated General
Contractors of America, Inc.